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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: WAC 03 082 50991 Office: CALIFORNIA SERVICE CENTER Date: JAN 31 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief not merely contesting the conclusions reached in the decision, but the reviewing officer's command of the English language. Counsel's most serious accusations are not supported by the record. Most seriously, counsel accuses the reviewing officer of failing to consider a September 26, 2002 letter from [redacted], in addition to leaving off the last name when referencing a second letter [redacted]

> The decision here is totally nonsense. It makes no sense. It demonstrates that the examiner responsible hasn't even read what was submitted.
>
> * * *
>
> It is quite clear that this examiner is not competent at either reading or writing in the English [l]anguage. Obviously, based upon this sloppiness and apparent inability to understand the English [l]anguage, he should not be doing this job. This job requires a native English speaking person who is capable of understanding law and technology. This examiner is certainly neither.

While counsel accurately claims that the initial letter from [redacted] was quoted in counsel's initial cover letter, which referenced a different classification, counsel is incorrect that the letter was included in Appendix A of the initial submission or anywhere else in the initial submission. In fact, two other letters quoted by counsel in the initial cover letter, from [redacted] and [redacted] are also missing from Appendix A in this record of proceedings. The initial letter from [redacted] has been submitted on appeal and will be considered below.

Counsel continues:

> I am totally sick to death of getting this kind of response from people who are obviously incapable of doing a job this complex. The decision is also written in Pidgin English, as shown above. See also the bottom of page 2, where "job duties" apparently include several run on sentences taken off of the ETA-750, which, in the previous paragraph, is stated not to have been submitted.
>
> I am sick to death of having to argue all my cases two or there times because of lazy or incompetent examiners. It is time the Service Center remedied this problem. Either that or Congress will.

While the director's decision contains a few grammatical and spelling errors, we do not find that such errors suggest that the author of the decision had no command of English or speaks "Pidgin English." We note that the second letter from [redacted] contains a grammatical error.[1] Yet this office makes no suggestion that Dr. Liu has no command of the English language.

Further, counsel confuses the Form ETA 750A, certified by the Department of Labor, with the Form ETA 750B, completed by the alien. The director correctly noted that the petitioner had not submitted a certified Form ETA 750A as the petitioner is requesting a waiver of that requirement. In response to the director's request for additional evidence, the petitioner submitted the Form ETA 750B, which is required even when the job offer requirement is waived.[2]

Finally, we note that all appeals are given due consideration regarding matters of law and fact irrespective of claims of gross incompetence. For the reasons discussed below, while some of the director's concerns have little merit, counsel's legal and factual assertions do not sufficiently address the director's legitimate concerns.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds several advanced degrees, including a Ph.D. in material engineering from Tongji University awarded in 1999, a Master's in Materials Science from the University of Illinois at Chicago awarded in May 2001, and a Master's Degree in Electrical Engineering from the University of Massachusetts awarded in May 2002. The petitioner was a Ph.D. student in Systems Engineering at the University of California, Berkeley (UC Berkeley) at the time of filing. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

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[1] The first line of the final paragraph on page one includes the phrase, "having you read anything that has been submitted so far?"

[2] 8 C.F.R. § 204.5(k)(4)(ii).

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, civil and environmental engineering, and that the proposed benefits of her work, improved sensor technology, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

[redacted] a professor at UC Irvine, asserts that she knows the petitioner professionally and classifies her as an extraordinary researcher who has successfully worked on projects "founded" by the National Science Foundation (NSF) and the U.S. Air Force. First, [redacted] explains that monitoring technology is vital to securing the integrity of structural systems including buildings, bridges and utility facilities. She further asserts that conventional monitoring systems are not used in large numbers because they are large, expensive, require high power and require electrical cables for signal transmission and power supply, making them susceptible to lightening strikes. According [redacted] the petitioner developed a cheaper, wireless PVDF sensor for structural monitoring that shows "great potential for overcoming the difficulties associated with conventional sensors." Later in the letter, [redacted] asserts that the PVDF sensor is the first in the world and can monitor a

full-scale skyscraper [redacted] does not identify a skyscraper that has been successfully monitored by PVDF or an agency that has adopted or licensed the sensor technology.

Second, [redacted] asserts that the petitioner is a "key developer" for the Adaptive Real-Time Geoscience and Environmental Data Analysis, Modeling and Visualization, a new technology to protect the environment and forecast natural disasters. [redacted] does not, however, identify a specific contribution made by the petitioner to this project or attest to any success this project has enjoyed. [redacted] attests to the technology's complexity and predicts that this area of research "will help our country to set up a real-time, highly reliable, economic environmental monitoring and protection system."

[redacted] an associate professor at Lehigh University, provides similar information. [redacted] explains that the goal of the Adaptive Real-Time Geoscience and Environmental Data Analysis, Modeling and Visualization project is to develop "Smart Dust" capable of sensing and responding to changes in temperature, humidity, sound, light, electromagnetic waves, displacement and acceleration. The applications for "Smart Dust" include monitoring for upstart forest fires and monitoring enemy activities in war.

[redacted] a professor at the University of Pavia in Italy, discusses the importance of sensor technology and asserts that the petitioner "has successfully developed a structural monitoring system based on PVDF material that allows, for example, the structural integrity of a high-rise building or bridge to be tested after a potentially weakening event."

[redacted] a senior research scientist at the Institute of Construction Materials, University of Stuttgart, Germany, provides general praise of the petitioner's credentials and responsibilities at UC Berkeley.

In his initial letter [redacted] ogram Director of the Division of Civil and Mechanical Systems in the Directorate for Engineering at the National Science Foundation (NSF), asserts that he first met the petitioner while she was a student at Tongji University and currently interacts with her during his frequent visits to UC Berkeley. [redacted] describes the petitioner's research on two projects "founded" by NSF and a U.S. Air Force project as "truly outstanding." Specifically, [redacted] asserts that the petitioner "successfully measured and modeled the low frequency response and the hybrid characteristic of the PVDF materials and then developed a very promising PVDF sensor, which could meet the needs for the civil structure monitoring in an unusually effective way – the first of this kind in the professional domain." Regarding the petitioner's work on Adaptive Real-Time Geosciences and Environmental Data Analysis, Modeling and Visualization [redacted] asserts that the petitioner worked with piezo-material sensors, ultrasonic sensors, and non-destructive testing of structures and materials. [redacted] concludes that this work "has been well known and highly raised and valued by her colleagues, professional and users" [redacted] does not provide any examples of "users."

[redacted] who recruited the petitioner to the University of Massachusetts, Lowell, asserted that she designed an optical sensing system using micromechanical machines (MEMs) for wavefront sensing under a grant from the U.S. Air Force. [redacted] asserts that this system could be used for monitoring and finding hidden targets. [redacted] oes not assert that the University of Massachusetts or the U.S. Air Force patented this system or that the military has begun experimenting with this system. The record does not include letters from the U.S. Air Force explaining the significance of this project.

In response to the director's request for additional evidence, including advisory opinions, the petitioner submitted a second letter [redacted] emphatically asserts that his initial letter constitutes such an opinion. [redacted] continues:

> The fact that I am taking time to write a SECOND Advisory Opinion when your examiner couldn't take the time to read the first letter is a strong indication that [the petitioner] is INCREDIBLY VALUABLE TO NSF PROJECTS THAT ARE IN THE NATIONAL INTEREST, and THAT WE FULLY EXPECT THAT THE PROSPECTIVE BENEFIT OF ISSUING THIS WAIVER TO HER WILL RESULT IN RESEARCH THAT WILL BENEFIT THE NATIONAL INTEREST.
>
> [The petitioner] is working on a project that is funded by NSF. As I stated in my previous letter, she is UNIQUELY QUALIFIED TO DO THIS WORK, and her results so far have been spectacular.

(Emphasis in original.) This letter does not add any examples of specific contributions or explain how they have influenced the field beyond being original. As stated abov[redacted] initial letter is not included among the initially submitted documents in the record of proceedings but has been considered on appeal.

[redacted] Director of the Mechanics and Materials Program, Engineering Directorate, NSF, asserts that the petitioner's unique combined education allows her to successfully complete her research [redacted] further asserts that the petitioner's PVDF sensor is "one of the best systems in the world for monitoring the full scale structure's health and safety." [redacted] concludes that the petitioner's current work on a project "founded" by NSF involves "developing a set of real-time, integrated database management and field data acquisition tools for rapid and adaptive assessment of key parameters during and following major catastrophic events."

[redacted] Resilient Systems and Operations at the National Aeronautics and Space Agency (NASA) Ames Research Center, provides similar information, concluding that the federally "founded" research projects on which the petitioner has worked "are self-evidently in the national interest of the United States." [redacted] does not assert that NASA as an agency has expressed any interest in utilizing the petitioner's sensors.

The witnesses all discuss the importance of the petitioner's projects. We have already acknowledged the intrinsic merit of the petitioner's area of work. Eligibility for the waiver must, however, must ultimately rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver.

Further, many of the above witnesses focus on the petitioner's multidisciplinary background. While we acknowledge that the petitioner has obtained multiple advanced degrees in different areas of engineering, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

In addition to the above letters, the petitioner submitted her acceptance letters for graduate schools that she did not attend. Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. *Id.* We cannot conclude that any graduate applicant who gains admission to prestigious universities warrants a waiver of job offer requirement in the national interest.

The petitioner also submitted an article in the University of Illinois at Chicago's College of Engineering Magazine discussing the work of [redacted] the petitioner's PVDF collaborator. The article, published in the Fall of 2001, asserts that [redacted] magnetic sensor was to be installed in the Kiswaukee Bridge in Northwest Illinois. The article does not mention the petitioner by name. According to one of the articles authored by the petitioner, PVDF is the abbreviation for Polyvinylidene fluoride. The abstract for that article references PVDF film, but no mention is made of magnets or magnetism. It can be expected that if the petitioner's sensor were actually in use, one of the petitioner's references would have mentioned it. It remains, the petitioner has not established that her PVDF work relates to the magnetic sensors installed on the Kiswaukee Bridge.

The petitioner also submitted an article about a California team, also funded by NSF, devising a wireless sensor using quartz crystals. This article merely serves to establish that other groups are also working towards developing wireless sensors. As stated above, we acknowledge that the petitioner works in an area of intrinsic merit and that the benefits of developing a cheap wireless sensor would be national in scope.

Finally, the petitioner submitted the grant for her current research at UC Berkeley under Professor [redacted] are the authors of the grant. The petitioner is not identified as key personnel or at all and her work is not cited as a reference for the proposal.

The director noted the lack of frequent citation by independent researchers and opined that original results are inherent to the field. The director further noted that none of the references describe how the petitioner's work influenced their own work. The director concluded that that the record did not distinguish the petitioner's publications from other published work in the field and that the claims that she would benefit the national interest were hypothetical and based on possible future achievements.

On appeal, counsel states:

> ALL THREE AGENCY ADVISORY OPINIONS, PLUS THE ONE ORIGINALLY SUBMITTED WITH THIS PETITION, WERE IGNORED. The obvious question is, was this examiner even aware that an agency opinion was solicited, what it was, or that it had some value? Why is an Advisory Opinion being solicited if it is then ignored? What is going on at the CSC?

> The Advisory opinion letters here say it all. High ranking officials at NSF and NASA AMES state that this petitioner is incredibly valuable to our national interest, that she is a key research on key NSF funded projects, that she is unique and cannot be replaced and yet we still get an idiotic denial letter.
>
> After four advisory opinion letters, we still get the incredible conclusion, "Although the self-petitioner appears to be a talented researcher in her field, there is little evidence to persuade the Service that granting a waiver of the job offer requirement would be in the national interest in this case."
>
> **Unbelievable!**

(Emphasis in original.) Advisory opinions are just that, advisory. While letters from high-ranking experts in the field are useful in evaluating a petitioner's claimed contributions to the field, the content of the letter must be evaluated and the record as a whole must be the basis of the final determination. In evaluating the content of reference letters, Citizenship and Immigration Services (CIS) considers letters that identify specific contributions and explain how those contributions have already influenced the field more persuasive than letters that simply discuss the importance of the project and provide general praise of the petitioner's skills and rank the petitioner in relation to others in the field.

We acknowledge that some of the director's concerns have little merit. For example, most scientific work is the result of collaborations and we disagree that collaborative efforts necessarily diminish the contributions of individual collaborators. Moreover, the director's conclusion that the letters are highly complimentary conflicts with his conclusion that they do not evaluate the petitioner. In addition, *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219, n.6 specifically states that "the alien's past record need not be limited to prior work experience." Thus, the director's apparent dismissal of the petitioner's accomplishments simply because the petitioner was a student at the time is in error. It would be more consistent with that precedent decision to say that original work is expected of graduate students and, thus, original research performed as a graduate student is not sufficient to warrant the national interest waiver without additional evidence that the research was influential in the field to some degree.

Ultimately, however, the director based his decision on valid concerns. Specifically, we concur with the director that the letters do not explain how the field has already been influenced by the petitioner. Moreover, while we do not question the credibility of the references, the claims they make would obviously be more persuasive if supported by objective evidence. For example, Dr. [redacted] states that the petitioner is "highly cited." Evidence of citation is easy to produce either through a published citation index or electronic citation database. The petitioner, however, has not provided evidence that any of her articles have been cited. On appeal, counsel fails to address the director's plainly worded concern on page 6 of his decision regarding the lack of citation evidence.

Finally, the petitioner's references claim that she has developed a first-of-its-kind wireless sensor system that outperforms all other sensor systems, yet they provide no examples of its use. It can be expected that an individual who had developed a groundbreaking sensor system would be able to produce a patent application for the system, evidence that manufacturers are expressing interest in licensing and marketing the system, and evidence that customers are expressing interest in utilizing the system. The petitioner has not submitted such

evidence. The petitioner's references claim that she is among the key personnel on various research projects, but the record lacks grant applications identifying her as such.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.